Fair Political Practices Commission
MEMORANDUM

To: Chairman Getman, Commissioners Downey, Knox, and Swanson

From: Lawrence T. Woodlock, Senior Commission Counsel
Luisa Menchaca, General Counsel

Subject: Expenditures at the Behest of Candidates or Committees.
Adoption of Amendments to Regulation 18225.7;
Adoption of Regulation 18550.1.

Date: January 3, 2003

Introduction

Since 1995, regulation 18225.7 has defined expenditures made "at the behest of" a candidate or committee. On March 13 and August 8, staff held Interested Persons' Meetings to measure interest in refined guidelines for identifying such coordinated expenditures, and to solicit opinions on how best to approach the task. Having found substantial support for rules that are clearer, staff revised regulation 18225.7 and presented draft amendments to the Commission at its monthly meetings in July and September 2002. In July, the Commission requested specific modifications to the proposed regulation. Staff returned to the Commission in September for adoption of the regulation as modified.

Lance Olson and Diane Fishburn submitted a comment letter for the September meeting, urging revisions to the scope of the proposed regulation, elimination of presumptions, and inclusion of additional rules for specific cases. They asked that the Commission abandon its current definition of expenditures "made at the behest of" candidates or committees, in favor of a new regulation interpreting § 85500(b), a statute added to the Act last year by Proposition 34 to regulate the involvement of candidates (but not committees) in "independent expenditures." The Commission was unable to evaluate the merits of this proposal at the September meeting, and directed staff to study it and return at a later date.

Staff has reviewed its draft regulation along with the Olson/Fishburn proposal, and has taken public comment at another Interested Persons' Meeting held in November. In a nutshell, staff has reached the following conclusions. First, an ambitious attempt to redesign regulation 18225.7 and, in particular, to systematize the terminology of subdivision (a), sidetracked debate over more substantive issues. It is possible without loss to add new provisions to the framework of the *existing* regulation. The draft now before the Commission will make clear exactly how and where proposed amendments clarify existing language.

Second, current regulation 18225.7 does not answer many legitimate questions where an expenditure may – or may not – be "made at the behest of" a candidate or committee. Advice letters have filled gaps left by regulation 18225.7 since it was adopted in 1995. Staff believes that the proposed amendments will reduce demand for such advice, although the regulation

cannot anticipate all circumstances and combinations of circumstances that may arise in particular campaigns. But it should be apparent that the regulation is designed to accommodate additional rules or exceptions, if experience suggests the need for further revision in the future. The proposed amendments are not intended to change existing Commission interpretations, but they do in many cases clarify the important term defined by this regulation.

In addition, if the Commission decides that a regulation should be adopted to interpret § 85500(b), staff offers a regulation tailored to that purpose, appropriately numbered 18550.1. But the fundamental question is still whether regulation 18225.7 should be amended. The next section discusses these proposed amendments in some detail.

Part I: Amendments to Regulation 18225.7

1. Subdivision (a) – the current general definition.

Subdivision (a) in the amended regulation is unchanged from the same subdivision in the current regulation. The amendments offered by staff in September replaced this subdivision with a longer paragraph intended to clarify the current language without substantive change. This effort caused more confusion than it was designed to cure, so staff concluded that the benefits of familiarity counseled against distracting changes.

Subdivision (a) defines "made at the behest of" through a series of synonymous terms; "made under the control or at the direction of, in cooperation, consultation, coordination, or concert with, at the request or suggestion of, or with the express, prior consent of." Subdivision (b) of the current regulation departs from the general to define two specific circumstances where "[a]n expenditure is presumed to be made at the behest of a candidate or committee." The final subdivision (c) identifies two particular cases when an expenditure is *not* made at the behest of a candidate or committee. These last subdivisions help solidify the relatively vague definition given in subdivision (a).

The current regulation provides guidance in determining the range of meanings applied to "made at the behest of," and such terms as "in cooperation, consultation, coordination or concert with." The regulation itself, limited to defining "made at the behest of," generates no questions as to *whose* activities are at issue. The term defined by this regulation appears in the Act's definition of "contribution" at § 82015(b), which expressly refers to candidates and committees. When a "behesting" question arises under § 82015, the scope of the inquiry is set by § 82015 – was an expenditure made "at the behest of" a candidate or committee? The definition for "made at the behest of" should answer "yes" or "no," without regard to the identity of the actors. The consequences following from the answer are specified by § 82015, not by regulation 18225.7.

"Made at the behest of" also appears in § 85310(c), which establishes disclosure requirements for communications identifying state candidates. Section 85500(b), which

distinguishes "independent expenditures" from "contributions," employs the words used by regulation 18225.7(a) to define "made at the behest of," and provides in effect that a communication is not an "independent expenditure" if it is made at the behest of the candidate who benefits from the expenditure. A person applying either of these statutes can look to regulation 18225.7 and find a definition to guide application of the statute at issue.

The questions addressed by regulation 18225.7 go to the interactions between persons involved in a political campaign – if A asks B to make an expenditure on behalf of C, is the expenditure by B "made at the behest of" A? Subdivision (a) is designed to answer such questions, regardless of statutory context, but it does not answer many recurring questions – including the question illustrated above. The amendments offered by staff are designed to provide fuller and more concrete explanations, centered on recurring factual situations not expressly described in the existing regulation.

2. Subdivision (b) – **Decision 1**. *Specific examples of expenditures "made at the behest of" candidates or committees.*

In the current form of regulation 18225.7, subdivision (b) states presumptions that certain described expenditures are "made at the behest of a candidate or committee," an important tool which the amended version retains as subdivision (c). As presently written, however, the regulation offers a general definition in subdivision (a) without providing clear examples of expenditures that *are* "made at the behest of" candidates or committees. The public and the regulated community have repeatedly asked for guidance of this sort, and staff's principal focus in amending this regulation has been to add practical, illustrative descriptions of the expenditures considered to be, presumed to be, or considered *not* to be, "made at the behest of" a candidate or committee. The current regulation lacks a specific description of expenditures that will, in all cases, be characterized as having been made "at the behest of" a candidate or committee. Staff has therefore inserted a new subdivision (b) into the proposed regulation to cure that omission. Thus the presumptions currently stated in subdivision (b) have been moved to subdivision (c).

The Commission has already seen proposed subdivision (b), which has generated little controversy to date. As indicated by the prefatory word "include," the list is not exhaustive, but it does describe specific kinds of candidate or committee involvement in typical campaign expenditures which justify *in all cases* a conclusion that the expenditure was "made at the behest of" a candidate or committee. In effect, this subdivision offers concrete, real-world examples to explain words listed without elaboration in subdivision (a), such as "in cooperation, consultation, coordination, or concert with."

At the September meeting, there was one objection to the scope of subdivision (b)(2), which refers to communications in which a candidate or ballot measure is "clearly identified," but which says nothing about whether the communication also contains "express advocacy." The basis of this objection is the notion that campaign speech should not be regulated unless it contains "express advocacy," a term of art defined at regulation 18225(b)(2). In simple terms,

a communication contains "express advocacy" if, in connection with a "clearly identified" candidate or ballot measure, the communication uses words plainly calling for action at the polls employing words such as "vote for," "elect," "support," "defeat," "reject," etc.

It is a simple matter to avoid "express advocacy" as legally defined, so any person who wished to avoid regulation 18225.7 could simply adjust the *form* of the message. Few persons would need even that simple maneuver, since most campaigns have already abandoned express advocacy – focus groups have made it clear that voters respond negatively to overt commands.[1] The question is, does the law *require* that the Commission step aside when candidate X "behests" an election-eve blitz reminding television viewers that she is tough on crime?

This argument was, indeed, advanced during recent FEC rulemaking proceedings on "Electioneering Communications." (See, e.g. testimony of Robert Alt, FEC Hearing Transcript for August 28, 2002.)[2] The FEC rejected this argument and adopted as its definition of "electioneering communication" (subject to regulation under the Bipartisan Campaign Reform Act) any broadcast communication "that refers to a clearly identified candidate.…" There is no requirement that the communication contain "express advocacy." (See 11 CFR 100.29(b)(2), Federal Register, Vol 67, No. 205, October 23, 2002, page 65192.) This question was decided long ago by the Supreme Court in *Buckley v. Valeo*, 424 U.S. 1 (1976), and more recently, in *Federal Election Commission v. The Christian Coalition*, 52 F. Supp.2d 45 (D.D.C. 1999),[3] the court's refusal to narrow the federal coordination rule in response to a First Amendment claim highlighted the governmental interest in avoiding such a truncated regulation. (*Id*. at 88.)

The *Christian Coalition* court illustrated the effects of a coordination regulation "focused" too narrowly, by describing the opportunities such a rule would afford corporations and unions to circumvent the federal ban on contributions from such entities. California does not ban contributions from such entities, but it does impose contribution *limits*, which would be nullified in the same fashion if the most common forms of coordinated expenditures were not deemed to be "contributions." In *Buckley*, the Supreme Court recognized that a clear doctrinal boundary between contributions and expenditures could not be maintained if donors subject to contribution limits could bypass those limits simply by making payments on behalf of (and "at the behest of") a candidate. The Court noted with approval that the federal law solved this problem by treating coordinated expenditures not as "expenditures," but as "disguised contributions." (*Buckley, supra*, 424 U.S. at 46-47; *Christian Coalition, supra*, 52 F.Supp.2d at 84.)

The Act likewise treats expenditures made "at the behest of" a candidate or committee as "disguised contributions." That is the point of regulation 18225.7, which has never been limited to "independent expenditures." The current and proposed regulation apply to *all* expenditures "made at the behest of" a candidate. This broad application is even more critical today than it

[1] See page 11 below.
[2] The FEC hearing transcript, and the text and commentary on the newly adopted 11 CFR 100.29(b)(2) can be read and downloaded from the FEC website at http://www.fec.gov/pages/bcra/rulemakings/rulemakings_bcra.htm.
[3] Included as Ex. E in the materials supplied with the July memorandum on this regulation.

was in the past, since the importance of express advocacy in campaign advertisements has declined in recent years, while the Act has acquired contribution limits, which can easily be evaded if a coordinated expenditure is no longer regarded as a "disguised contribution" simply because a campaign advertisement avoids commands like "vote for," "vote against," and so on.

The Act does not contemplate this outcome. At the September meeting there was some discussion to the effect that regulation 18215(c)(4) establishes quite the opposite. Regulation 18215(c)(4) provides that a payment made at the behest of a candidate to fund a communication is *not* a contribution if the communication lacks *both* express advocacy *and* reference to the candidate. Because this exception to the definition of "contribution" is effective only when *both* criteria are satisfied, the absence of "express advocacy," by itself, does not exempt a communication from regulation under the Act. Section 82015(b)(2)(C) leads to the same conclusion.

The Commission had expressed concern earlier that the proposed amendments might alter the Act's definition of "contribution," and staff has addressed that concern in redrafting the regulation now before the Commission. But it is important to emphasize that regulation 18225.7 defines *only* "made at the behest of." Establishing that a payment was "made at the behest" of a candidate or committee does not automatically classify the payment as an "expenditure" or a "contribution." For example, subdivisions (c) and (d) of regulation 18215 list several cases where an expenditure "made at the behest" of a candidate is *not* a contribution. The proposed amendments do not modify definitions of "expenditure" or "contribution." They clarify what is meant by "made at the behest of," in whatever context that expression may be used.

3. Subdivision (c)(3)(A) – **Decision 2**. *The "joint employment" presumption.*

Subdivision (c)(3)(A), treats the problem of "joint employment." For example, when a person producing a television ad critical of Candidate X retains the campaign consultant of rival Candidate Y, it is natural to suspect that the consultant was retained for his expertise in the needs of Candidate Y, or the vulnerabilities of Candidate X discovered during Y's "opposition research."[4] It would be difficult for an outsider to uncover evidence sufficient to prove the natural supposition that the consultant acted here in his accustomed role as agent for the candidate. Yet evidence tending to refute the supposition would tend to be readily available to the consultant, the new employer, or Candidate Y.

The "joint employment" presumption generated lengthy discussion at prior meetings. One problem noted by the Commission was identification of persons whose "joint employment" appropriately raised eyebrows. The challenge was to avoid inclusion of lower-level workers and volunteers without "inside knowledge" of campaign strategy. Staff has addressed this problem by rewording subdivision (c)(3)(A). Given the lack of fixed and uniform job titles, the rule cannot be targeted more specifically. But the restriction to persons who provide "professional

[4] Although written five years before adoption of the presumptions now contained in regulation 18225.7, the *Davis* Advice Letter (No. A-90-173) saw a "strong inference" of coordination in such joint employment cases.

services related to election strategy or advocacy" should exclude the bookkeepers and similar administrative support staff who were the object of concern at the September meeting.

Another source of controversy in September was application of the presumption to cases of *serial* employment, where for example a consultant "leaves" a candidate to work for a person producing advertisements supporting the same candidate. The problem here is deciding, first, whether the regulation should apply at all to persons who sever their formal connection with a campaign. Second, if the Commission finds that the presumption should attach to former employees (because of the ease with which the presumption might otherwise be evaded, or simply because a former campaign official would bring to his new employer "inside knowledge" acquired in the former employment), the next problem is determining the length of the post-employment period during which the presumption would attach. This is **Decision 2a.**

At the September meeting, the Commission seemed to concur that a "joint employment" presumption is necessary in cases of simultaneous employment, in light of the obvious potential for wholesale, undocumented coordination between campaign and supporter through an inter-mediary who moves daily between one employer and the other, serving the interests of both.

There was less agreement on application of the presumption in cases of serial employment. The argument for the presumption is straightforward. There is first an "anti-evasion" rationale; that the presumption is necessary in cases of serial employment because, if there were no such presumption, persons wishing to avoid the consequences of simultaneous employment would simply restructure their formal relationships. A candidate and consultant might agree on a "revolving door" arrangement where the consultant would continue to further the interests of the candidate while producing campaign materials elsewhere, in the expectation of subsequent reemployment by the campaign. Or the candidate and the advertising agency might simply come to an understanding whereby the agency takes over the cost of the consultant, eliminating the need for reemployment. Arrangements such as these could be proven only in those rare cases where a disgruntled insider came forward.

But the case for the presumption in serial employment does not depend on the likelihood of a crude conspiracy to preserve the former agency relationship during a period of outside employment. A person deeply involved in a campaign's election strategies, who left the campaign to offer his expertise to someone interested in supporting the campaign's positions, would be working the same job from a new office. There are many reasons why a campaign, or a person wishing to produce advertisements consistent with the campaign's message, would want to see a professional operative with "insider" knowledge working *outside* the campaign. The end result is the same regardless of the motives of the parties involved. A campaign consultant's energy and expertise can be transferred from a campaign to an outside supporter whether or not the consultant retains a desk at campaign headquarters and is formally employed by both parties.

A post-employment presumption *should* be limited in duration. Strategic information retained by a former campaign employee will grow stale over time, and long-term presumptions

could quickly become burdensome in the small world of campaign professionals. In September, the Commission indicated that a twelve month duration for such a presumption seemed too long, and there was some sentiment for restricting a post-employment presumption to employment within the same "election cycle," a term added to the Act at § 85204, and defined as follows:

> " 'Election cycle' for purposes of Sections 85309 and 85500, means the period of time commencing 90 days prior to an election and ending on the date of the election."

If the term "election cycle" were to be employed in regulation 18225.7, it should have the meaning given to it by § 85204, to avoid the confusion that grows up around a defined term with more than one meaning. Section 85204 is not used to define the entire span of a campaign, but only a late stage when electronic reporting is critical to providing observers with rapid updates on fast-breaking events typical of the weeks immediately preceding election day. A period at the very end of a campaign may not be useful when the activity of interest is campaign planning and coordination, which occur well before late-season expenditures are made.

As a compromise, staff offers options that would apply the presumption of subdivision (c)(3)(A) only for serial employment by a campaign during an election cycle (i.e. covering only job changes within the 90 days preceding an election), or which would apply the presumption to employment by the campaign up to six months prior to the new employment. Keeping in mind that there is no limit on when primary campaigns may begin, and that there is presently an eight month interval between statewide primary and general elections, staff believes that a six month period may be more sensible in this case.

4. Subdivision (c)(3)(B). Reproduction of campaign materials.

Debate over this subdivision was restrained in September. The Commission felt that this presumption was reasonable, but should be limited to republication or dissemination of campaign materials "in whole or *substantial* part." The crucial term has now been added.

5. Subdivision (d) – **Decision 3**. *The presumption applied to fundraising activities.*

The Commission has not seen this provision before. It was proposed during staff's review following the September meeting. The operation of this presumption is self-evident, and it is justified by staff's observation that fundraising efforts on behalf of a particular candidate or committee are seldom conducted without "input" from the intended beneficiary.

6. Staff Recommendations on subdivisions (c) and (d)

The Enforcement Division strongly urges adoption of the new presumptions offered in the proposed regulation so that its staff will have clear guidelines for evaluating more incoming cases, and additional tools encouraging them to accept a class of particularly "troublesome" cases

that might otherwise go unprosecuted because of the resources they require.

The Technical Assistance Division also urges adoption of the new presumptions, because they will educate the regulated community by more clearly indicating where the legal lines are drawn. On a more practical level, the amendments proposed here will provide authority for Political Reform Consultants, who must explain the Commission's rules to members of the regulated community and the interested public. The presumptions now before the Commission are consistent with prior advice, but provide a more immediate source of authority.

The Legal Division believes that these presumptions are fully consistent with statutory, constitutional, and common law principles generally, and with prior interpretations of the Act. Because these presumptions will not only aid enforcement authorities in situations where evidence is typically under the control of respondents, but will educate the regulated community on behavior requiring caution, they further two important purposes of the Act.

4. Subdivision (e) – **Decision 4**.

Subdivision (e) carries over the two "safe harbor" rules in subdivision (c) of the current regulation, and adds four new ones outlining actions and circumstances where, without more, an expenditure is *not* "made at the behest of" a candidate or committee. Subdivision (e)(1) is an existing provision, amended to remove an unnecessary proviso and to include a similar rule concerning discussions unrelated to a campaign. Subdivision (e)(2) is the second of the current rules, with non-substantive stylistic amendments.

Subdivision (e)(3) is a new rule, making clear that an expenditure is not "made at the behest of" a candidate (within the meaning of the Act) if the expenditure is made in response to a public plea for support. This provision is added to clear up the confused semantics of "at the behest of" and similar expressions ("at the request or suggestion of," etc.). Critics have noted that *any* expenditure made in response to any candidate's public plea for support is, strictly speaking, an expenditure "made at the behest of" the candidate. However, unilateral reactions to public campaign speech should not be made subject to regulation 18225.7. If they were, virtually *all* expenditures by all persons would be "made at the behest of" some candidate or committee, a result never contemplated by the Commission.

Subdivision (e)(4) is similar, extending the theory of subdivision (e)(3) to the context of public appearances before membership organizations, a common type of event that allows the members to evaluate candidates or committees which the organization may later choose to endorse or promote. This provision indicates clearly that such appearances do not, alone, amount to such coordination that subsequent expenditures would be deemed to have been "made at the behest of" the person making the appearance.

Subdivision (e)(5) treats a different kind of problem, where the intent to make an expenditure is communicated to the candidate or committee on whose behalf the expenditure is

made, but no further "campaign" information is conveyed beyond that bare fact. No legal or policy goal is advanced by implicating the candidate or committee in such an expenditure. It is counterintuitive, to say the least, to suggest that an expenditure was "made at the behest of" a person whose role was so passive and limited. Nevertheless, the question comes up regularly since people will talk about their political activities. Both the regulated community and the Technical Assistance Division believe that this subdivision would anticipate many questions, and provide useful guidance on the safe limits of conversation between independent speakers and the candidates or committees they support.

Subdivision (e)(6), like subdivision (e)(3), treats expenditures that might, in a literal sense, be regarded as "made at the behest of" a candidate or committee. Specifically, when a candidate "behests" a contribution to *another* candidate, a wooden application of § 82015 and (the current) regulation 18225.7 would result in the contribution being reported as a contribution to the "behesting" candidate, rather than to the candidate who actually receives and uses the money. To avoid this result, regulation 18215(d) specifically provides:

> "A contribution made at the behest of a candidate for a different candidate or to a committee not controlled by the behesting candidate is not a contribution to the behesting candidate."

Subdivision (e)(6) simply applies this rule to expenditures under proposed regulation 18225.7, and effectively "codifies" longstanding advice to callers perplexed by relatively common three-party transactions. The current version of regulation 18225.7 states rules appropriate only to two-party transactions, which yield anomalous outcomes whenever the person requesting a payment is not the person who receives it.

Finally, subdivision (f) clarifies the meaning of "candidate" and "committee" throughout this regulation by providing that these terms include the agents of candidates and committees, when the agents are acting within the course and scope of their duties. Staff had recommended such a provision in September, together with a definition of "agent" that the Commission found unsatisfactory. There appeared to be widespread sentiment in favor of leaving the term to be interpreted under the usage of common law, and that preference is reflected in subdivision (f). Along with the proviso that, to bind the principle an agent must be acting within the course and scope of his or her duties, this provision should be uncontroversial. It is useful insofar as it reminds the reader that candidates and committees do have "agents," whose activities must always be taken into account.

Part II: Proposed Regulation 18550.1

1. Background

The Olson/Fishburn comment letter presented at the September meeting suggested rewriting regulation 18225.7, limiting its scope to implementation of § 85500(b), a statute

enacted in January, 2001 by Proposition 34. This new statute provides as follows:

> "(b) An expenditure may not be considered independent, and shall be treated as a contribution from the person making the expenditure to the candidate on whose behalf, or for whose benefit, the expenditure is made, if the expenditure is made under any of the following circumstances:
> (1) The expenditure is made with the cooperation of, or in consultation with, the candidate on whose behalf, or for whose benefit, the expenditure is made, or any controlled committee or any agent of the candidate.
> (2) The expenditure is made in concert with, or at the request or suggestion of, the candidate on whose behalf, or for whose benefit, the expenditure is made, or any controlled committee or any agent of the candidate.
> (3) The expenditure is made under any arrangement, coordination, or direction with respect to the candidate or the candidate's agent and the person making the expenditure."

Section 85500(b) treats a very narrow class of political communications, in contrast to regulation 18225.7, which governs "expenditures" generally under the Act's all-encompassing definition of the term at § 82025. Staff argued at the September meeting that it would be unwise to replace the existing, comprehensive rule with something that treats only a single subclass of expenditures. The essential background to the September debate is relatively straightforward. The Act recognizes a distinction between two kinds of campaign "expenditures" which are not coordinated with a candidate. First, like federal law, the Act employs "independent expenditure" as a term of art, referring to an expenditure defined at § 82031 in the following manner:

> " 'Independent expenditure' means an expenditure made by any person in connection with a communication which expressly advocates the election or defeat of a clearly identified candidate or the qualification, passage or defeat of a clearly identified measure, or taken as a whole and in context, unambiguously urges a particular result in an election but which is not made to or at the behest of the affected candidate or committee."

An "independent expenditure" therefore displays three defining characteristics: (1) it is an expenditure made in connection with a communication; (2) it contains "express advocacy" for the election or defeat of a clearly identified candidate or measure; and (3) the communication is *not* "made at the behest" of a candidate. "Clearly identified" is defined at subdivision (b)(1) of the Commission's "expenditure" rule, regulation 18225. "Expressly advocates" is defined in the same regulation at subdivision (b)(2). The identification of "express advocacy" in practice is a vexed question which has divided the federal courts of appeal, and has recently caused an open

rift between the federal and California courts. For present purposes, it is safe to say that "express advocacy" refers to a communication containing a clear plea for a specific action by voters at an election, using words like "vote for," "elect," "support," "defeat," etc.

Any expenditure for a communication that does *not* contain express advocacy cannot be an "independent expenditure" as defined by the Act. There has in recent years been a large and well-documented tendency to avoid express advocacy in political campaigns. For example, the Brennan Center for Justice has released a major study entitled *Buying Time 2000, Television Advertising in the 2000 Federal Elections*, which found that 97% of campaign advertisements for the 2000 federal election cycle did *not* use language that could be taken for express advocacy.[5] Closer to home, an experienced political consultant testified last year that "*because campaign focus groups have found that voters resist being told or directed what to do*," current political commercials seldom, if ever, use exhortations that amount to express advocacy. [6]

In short, there is a formal distinction in both federal and California law between "independent expenditures" which, as a term of art, are communications using express advocacy to support or oppose a candidate up for election, versus expenditures on similar communications which, however, are *not* "independent expenditures" in a formal sense because they avoid express advocacy in favor of more gentle forms of persuasion.

Section 85500(b) *assumes* that an expenditure has been made in connection with a communication, and that the communication contains express advocacy of a clearly identified candidate. The sole function of the statute is to specify the circumstances under which the expenditure is regarded as "independent" of a *candidate* who benefits from the expenditure. To the extent that a regulation is needed to clarify this statute, it would explain the meaning of terms like "cooperation," "consultation," "in coordination with," "in concert with," and so on. Each of these terms is included in the present and the proposed versions of regulation 18225.7, defining these terms for *all* forms of expenditures, whether they fund communications containing "express advocacy" or (as commonly) the exhortation is less overt.

Since the September meeting, staff has prepared draft regulation 18550.1, specifically designed to implement and interpret § 85500(b). Its resemblance to regulation 18225.7 is not accidental, since the two regulations do the same thing, with regulation 18550.1 confined to the narrowly focused subject matter of § 85500(b), while regulation 18225.7 (both the current and proposed versions) governs *all* forms of expenditures, on ballot measures as well as candidates, coordinated with committees as well as with candidates.

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[5] The Brennan Center's study may be viewed, downloaded, or purchased from the organization's website, at http://www.brennancenter.org/programs/buyingtime2000.html. Staff at the FEC relied heavily on this study in defining an "electioneering communication," a communication featuring a "clearly identified candidate," which does *not* include express advocacy as an element of the term.

[6] Paragraph 4, Declaration of Garry South, filed August 15, 2001 in *The Governor Gray Davis Committee v. American Taxpayers Alliance*, San Francisco County Superior Court, Case No. 323057.

After the Commission determines whether it will adopt the proposed amendments to regulation 18225.7, it will be well positioned to decide whether it wishes to adopt a new regulation focused exclusively on § 85500(b). Staff does not have a clear preference on this threshold issue. Its objections at the September meeting grew out of the Olson/Fishburn proposal to *replace* regulation 18225.7 with a regulation addressing only § 85500(b). If the Commission adopts a *separate* regulation for § 85500(b), leaving some version of regulation 18225.7 intact, nothing is lost by adoption of a regulation governing § 85500(b).

2. Proposed Regulation 18550.1

The first paragraph of the proposed regulation is taken largely from the draft that accompanied the Olson/Fishburn letter in September. It is based on the language of the statute, and clearly describes the application of the regulation in determining whether an ostensibly "independent expenditure" will nonetheless be treated as a "contribution" under circumstances described in subdivisions (a)(1) and (a)(2).

Subdivision (a)(1) distills the general rule announced by the statute. Subdivision (a)(2) is more specific, describing communications between the candidate and the person(s) funding the communication. The language in subdivisions (a)(2)(A) and (B) is the same as the language discussed earlier in connection with proposed regulation 18225.7(b)(2)(A) and (B), but is applied here to candidates only. The function of this section is the same as that of regulation 18225.7(b), to describe actions that amount, in all cases, to "coordination" between candidate and supporter.

Subdivision (b) here corresponds to subdivisions (c) and (d) of proposed regulation 18225.7, describing expenditures that are presumed not to be "independent" of a candidate. The first four presumptions in this regulation are the same as the four presumptions in proposed regulation 18225.7(c)(1)-(3)(B), while the fifth presumption corresponds to that of proposed regulation 18225.7(d). Finally, subdivision (c) in this regulation is a "safe harbor" provision familiar from proposed regulation 18225.7(e).

3. Conclusion

To the extent that the Commission amends regulation 18225.7 along the lines suggested by staff, it may be prepared to approve the language of proposed regulation 18550.1, and there should be few barriers to adoption of that regulation, if the Commission decides that it would be a useful supplement to regulation 18225.7. On the other hand, if the Commission chooses not to adopt the proposed amendments to regulation 18225.7, it may be dissatisfied with the language proposed for regulation 18550.1, whether or not the Commission sees need for a regulation dedicated to § 85500(b). If the Commission decides not to amend regulation 18225.7, staff recommends that it *not* adopt regulation 18550.1. The use of language in regulation 18550.1 expressly *not* added to regulation 18225.7 could generate serious confusion over the intended construction of regulation 18225.7. In particular, candidates might think that rules clearly stated in regulation 18550.1, but conspicuously absent from regulation 18225.7, indicate that

expenditures “made at the behest of” a candidate under regulation 18550.1 cannot under any circumstances be so construed under regulation 18225.7, no matter how anomalous the result.